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NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

BARBARA HACKMAN FRANKLIN, et al.

Appellants,

v.

COMMONWEALTH OF MASSACHUSETTS, et al.

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

BRIEF OF THE STATE OF WASHINGTON AS AMICUS IN SUPPORT OF APPELLANTS UNITED STATES' MOTION FOR STAY

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BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE

Pursuant to United States Supreme Court Rules 37.2 and 37.5, the State of Washington files this brief of amicus curiae to support the Motion for Stay filed by the United States appellants.

The orders below meet the criteria for stay set forth by this Court (Republican State Cent. Com. of Arizona v. Ripon Soc., Inc., 409 U.S. 1222 (1972)). A stay pending appeal is justified because of the irreparable injury to Washington and its citizens and elections system. In this context "Washington citizens" include all those deprived of United States House representation (if one seat is lost or threatened) and especially those who were serving the country overseas on census day (April 1, 1990) who would be excluded from representation under orders of the court below. The following brief, taken with the brief of Appellants, indicates the probability the district court was in error. Finally, the public interests in assuring finality and confidence in the census/apportionment and related political system argues in favor of stay.

This case is unlike the situation in Campos v. City of Houston, 112 S. Ct. 354 (October 29, 1991). It is Massachusetts which solely bears the responsibility for delay in this action - having waited over one and one-half years after Commerce decision on counting the temporarily overseas to bring this action (and having waited over 5 months after receiving the Certificate of

Entitlement to United States House Seats. The effect of the lower court order is to disrupt the orderly and lawful conduct of Washington's elections and redistricting processes. A stay will cure these problems.

INTERESTS OF AMICUS WASHINGTON

The State of Washington's population grew faster than the national average during the decade 1980-90 (and considerably faster than Massachusetts). Thus, when the results of the 1990 census and the apportionments of United States House seats to the states were certified by the President and Certificates of Entitlement issued by the Clerk of the House of Representatives, Washington received an increase of 1 to 9 U.S. Representatives.[1]

Because Washington's ninth seat was the last allocated under the 1990 apportionment (number 435), several of the legal challenges filed by states losing seats[2] have sought a seat certificate to Washington--though that state has never been sued directly.

In this action, a three-judge United States District Court for the District of Massachusetts issued an order requiring the

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[1] Massachusetts' certificate showed a decrease of 1 to 10 seats, reflecting its relative population decline.

[2] The last considered by this Court was United States Dep't of Commerce v. Montana, U.S. Supreme Court cause number 91-860 (Argument, March 6, 1992).

results of the census be recomputed to exclude all U.S. government employees (including military) that records indicate were temporarily overseas on April 1, 1990.[3] The Executive (President) is ordered to submit a new statement showing the number of representatives to which each state would be entitled if these counts are excluded from congressional apportionment. The parties below, which did not include Washington, had stipulated that absent the inclusion of those federal employees, Washington would be entitled to only eight representatives. While Washington does not concede this is true, it is the potential loss of one of its U.S. House seats that prompts participation here.[4]

The district court ordered the Clerk of the United States House of Representatives to "send the executive of each state a recertification of the number of representatives to which such statute is entitled in accordance with paragraph 3 of this order." Final Decrees and Orders of the District Court, slip op.

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[3] Some of these persons and units were undoubtedly in the United States, and/or in transit on April 1, 1990. Surely they, and Washington, are entitled to a trial to show that blanket exclusion is not appropriate where, as here, it denies them political representation.

[4] First, the numbers come from records Massachusetts alleges and the court held are unreliable. Also, this stipulation must assume no other changes to census or apportionment. An "adjustment" as sought in New York v. Commerce, 713 F. Supp. 48 (1989) or a different apportionment methodology such as the "Webster method" urged by Massachusetts below, would leave Washington's nine seats unchanged.

at 2. The court ordered this to occur on or before April 10, 1992. It is presumed the defendants would act in accordance with their stipulation, and attempt to take a seat from Washington. This relief ordering Congress or the Clerk to issue new Certificates of Entitlement, was not requested in Massachusetts' complaint.

The court did not consider whether the Clerk has authority to change Certificates of Entitlement (and cited no such authority) and overruled Washington's objection that it was an indispensable party. The court also failed to consider the rights of those citizens who would be deprived of representation under its decision.

By this brief, Washington supports the Motion for Stay of the United States and urges that this Court stay the order of the court below pending a decision on the merits. The following briefly outlines the severe detrimental effects of the order, and legal analysis of why it is unlikely to be upheld on appeal. In order to avoid duplicating the U.S. arguments, we attempt to concentrate on legal arguments especially available to Washington and its overseas-serving citizens who are deprived of representation under the lower court's decision.

SEVERE DETRIMENTAL EFFECTS IF THE COURT ORDER IS NOT STAYED

Disruptive Effect in Washington

Absent a stay, the district court's order leaves a cloud over the representatives to which Washington is entitled under

both the Statement of the President and the Certificate of Entitlement issued by the Clerk (pursuant to 2 U.S.C. § 2a and 2b).

Washington's problems, especially the disruption of its elections process described below, are aggravated by the fact there are now two federal court judgments challenging, in different ways, its ninth district representative.[5] Obviously, both cannot be correct; Washington can not lose 2 seats. When may Washington and its citizens rely on the finality of this process?

Washington redistricting is final (as required by Washington Constitution) and its redistricting commission is no longer in operation. Even the Washington Legislature, which theoretically may change the redistricting plan, (Wash. Rev. Code § 44.05.100 (1989)) is no longer in session.[6]

Preparations for the 1992 Congressional elections are already in progress, both by the State and by the various candidates. Candidates have declared and filed public disclosure and financial reporting statements.

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[5] It is assuming the conflict between the Montana court orders and the Massachusetts' court order will be addressed by the U.S. defendants.

[6] The Washington Constitution sets forth a sixty day session commencing in January for even-numbered years (Wash. Const. art. II, § 12)).

The number of U.S. House seats also affects directly the number of presidential electors. Delegates states send to each major national party's convention and are selected in part based on congressional districts. Each party's local caucuses for selection of convention delegates were held March 3, 1992 in Washington.

Given the need for redistricting and the continued uncertainty, the Massachusetts court order would have the probable effect of making it impossible for Washington to conduct its election in accordance with its laws.

Effect on Unrepresented Voters
Massachusetts' Court's Theory of "One Man No Vote"
(If Serving Overseas)

More importantly, the court's order should be stayed because it has the effect of denying United States House representation to United States citizens who happen to be serving their country in an overseas location--often at the order of the Executive--on the day of the census.[7]

Washington represents its citizens so situated and indeed those of all states since neither the U.S. nor Massachusetts addressed below the rights of those absent citizens. The court

[7] With the inclusion decision of Commerce, the records did not have to be sufficiently accurate to show the precise locations of units and persons on one day, April 1, 1990. However, if the court order works an exclusion, and deprives citizens of representation because they are absent on that one day, the records must be subjected to trial or other due process scrutiny to assure that only those actually absent are affected.

herein disregarded the rights of all such citizens in its rush to add back a Massachusetts seat. It will be demonstrated further below that denying representation under such circumstances is unconstitutional as a violation of the equal protection concepts of the Fifth Amendment.

The Decision Disrupts the Finality of the
Census/Apportionment Process

The court's order should be stayed to achieve finality in the apportionment process. All states have an interest in finality of the census/apportionment process. The changing of figures ordered by the district court will affect not only the Washington U.S. House seat, but presumably leaves the way open to additional Administrative Procedure Act challenges to methodological decisions made by Census/Commerce. The litigation over "adjustment" is only one example.[8] It is extremely burdensome and disruptive to redistrict a second time after the difficult battles inherent in redistricting have been fought. Redistricting often brings to a halt the business of legislatures in states where redistricting is a legislative function.

This interest in finality was only overridden in Massachusetts by its desire to slow the inevitable loss of Congressional representation caused by its relative population decline. An extra House seat was worth it to the state. Overall, the interests to the body politic of assuring finality

[8] Other litigation demanding adjustment of the Census figures was, and is, pending in district court, e.g., New York v. Commerce, 713 F. Supp. 48 (1989) (preliminary rulings reported).

predominate. Statutorily, this finality is found in the explicit deadlines in 2 U.S.C. § 2a and 2b (December 26, 1990 for the Census; January 3, 1991 for the President's Statement of state representation; January 16, 1991 for House Certificates of Entitlement).

BACKGROUND AND PROCEEDING BELOW

The census of the United States was conducted as of April 1, 1990. 13 U.S.C. § 141(a). Nearly nine months before, however, all states had been advised of the final decision of Secretary of Commerce Mosbacher, that overseas federal employees would be counted in the 1990 census (Decision of the Secretary, August 1, 1989).

Far from complaining or moving to legally challenge this decision, there is no indication representatives of Massachusetts had opposed such an approach. For example, the U.S. House on June 26, 1990, passed on consent HR 4195 to prohibit exclusion of military personnel stationed outside the United States and to direct "home of record" be used. There was no recorded dissent from Massachusetts' representatives.

Given the overwhelming representatives' support for that measure, it seems likely that such a bill would have passed, were it not for the decision of the Secretary of Commerce to exercise his discretion as delegated by Congress, and order the counting of the (temporarily) overseas citizens and the later determination to utilize the "home of record" as provided in the bill(s).

On December 26, 1990, the census results including overseas federal employees were reported to the President as required by the statute. On January 3, 1991 (the first day of the 102nd Congress), the President transmitted to Congress a report showing the results of the 1990 Census, and the number of representatives to which each state was entitled.

On January 16, 1991, the Clerk of the United States House of Representatives transmitted to each state a Certificate of Entitlement to that number of representatives required by 2 U.S.C. 29(b). Massachusetts is entitled to ten, and Washington to nine under their respective certificates.

Nearly two years after the decision to include the temporarily overseas and five months after receiving its Certificate, the Commonwealth of Massachusetts filed this action on May 12, 1991. Washington moved to participate as an amicus, specifically noting its refusal to waive sovereign immunity to be sued and that it was an indispensable party in any suit to take a Washington House seat.[9]

The Washington Redistricting Process is Final

The Certificate of Entitlement to nine United States House seats was duly received by Washington's Governor, and transmitted

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[9] Washington also noted the probable unconstitutionality of denying representation of citizens whom the United States had ordered temporarily out of country on the census day, describing the Massachusetts theory as "one man no vote."

to the Washington Redistricting Commission established by Washington Constitution, article 2, section 43, amendment 74.

The Commission redistricted Washington into the nine United States House districts (and intertwined state legislative districts). The redistricting plan was completed and filed on January 1, 1992. It is now final. Wash. Rev. Code § 44.05.100 (1989). The Washington Legislature, like the redistricting commission, is now out of session.

The district court ordered Massachusetts to complete its redistricting by March 30, 1992, based on eleven House seats.[10] The court gave no consideration to the burden upon Washington, which had already completed redistricting. Consideration of such disruptive effects and public consequence is required, before extraordinary relief is ordered. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

Washington's elections system, including its participation in the nominating process for U.S. President, has proceeded in the interim. The caucuses of the major political parties were held on March 3, 1992. These are the first level of selection of delegates to the national conventions. Indeed, some delegates have already been chosen and the number is determined, among other factors by the number of presidential electors, and the districts (in part) from congressional districts.

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[10] Massachusetts made no effort to redistrict to 11 seats until ordered to do so by the lower court.

Washington has proceeded in good faith following the Statement by the President and issuance of the Certificate of Entitlement by the Clerk of the U.S. House both confirming entitlement to nine congressional seats (and districts).

A stay of the district court's order is imperative to avoid disruption of Washington's process pending a decision of this Court on the merits.

ARGUMENT

I. THIS COURT SHOULD GRANT A STAY OF THE DISTRICT COURT'S ORDER THAT CERTIFICATES OF ENTITLEMENT BE REISSUED, PENDING A RULING OF THIS COURT ON THE MERITS

The district court ordered that the Clerk of the House of Representatives, having already issued final Certificates of Entitlement to the various states, must now issue a new set, altering the numbers of Representatives for at least some states. This order would cause a serious hardship on states, such as Washington, who have already completed redistricting based on the Certificates. Preparations for the 1992 congressional elections are already underway, both by Washington and by the various candidates. Reissuance of the Certificates at this time, particularly pending a ruling on the merits by this Court, would duly disrupt the political process.

A. Reissuance of the Certificates Following Completion of Washington's Redistricting Would Seriously Prejudice Washington, Its Congressional Candidates, and Its Citizens

Washington has completed its congressional redistricting, in good faith reliance upon the Certificate of Entitlement

previously issued by the Clerk. There is no way Washington could lawfully have proceeded otherwise. Redistricting takes time, and may be a subject of considerable controversy. Election deadlines limit the time available. Schedules and deadlines are established by both the Washington Constitution and statutes.

Redistricting in Washington is governed by article II, § 43 of the Washington Constitution. In January of each year ending in one, the state's redistricting commission is convened to redraw all state legislative and congressional districts. Wash. Const. art. II, § 43(1). No legislative or congressional districts may be changed or established except under the auspices of that commission at that time. Wash. Const. art. II, § 43(11).

The commission must complete its redistricting as soon as possible, but not later than January 1 of each year ending in two. Wash. Const. art. II, § 43(6). Washington, therefore, could have done nothing to prevent the prejudice created by the order of district court. Regardless of pending litigation, the commission was constitutionally compelled to redistrict.

The Legislature may amend the plan before the thirtieth day of the first session convened after the plan is submitted, a date which has already elapsed. Wash. Const. art. II, § 43(7). Washington's redistricting is final and complete.

Time limits also significantly affect candidates for office, who require a reliable time line on which to operate and reliable district lines in which to run. In order to appear on the primary ballot, a candidate must file a declaration of candidacy

in July. Wash. Rev. Code § 29.18.025 (1989). However, activities by the candidates in reliance on specific districts begin far in advance of that date. Washington's Public Disclosure Commission has already received Statements of Candidacy of those running for Congress. Many of those candidates have already expended significant amounts of money, in reliance upon an expectation that they would be running in a district encompassing a certain geographic area.

If the district court's order is allowed to remain in effect, Washington's ninth district is threatened, even though this Court has not yet had an opportunity to address the merits of this case. Candidates and potential candidates have made their decisions to run or not to run based upon a settled expectation, which the court below would upset in its rush to award a seat to Massachusetts.

B. The Clerk Does Not Have Authority to Revoke Washington's Certificate of Entitlement[11]

The Clerk lacks the statutory or other authority to revoke or modify the Certificate of Entitlement of Washington or other states.

The applicable statute, 2 U.S.C. § 2a(b), provides that the Clerk shall issue a Certificate within 15 days after receiving

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[11] A related issue--that the Clerk has been enjoined by the lower court in United States Dep't of Commerce v. Montana, United States Supreme Court cause number 91-860 (Argument, March 6, 1992) from "effecting apportionment" under these statutes--will be addressed by the United States.

apportionment figures from the President. It does not provide, explicitly or otherwise, for the revocation or modification of a Certificate once it has been issued.

The word "shall" in statutory parlance is mandatory language. Board of Pardons v. Allen, 482 U.S. 369, 374 (1987); Bergen v. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989).

The statute even goes on to specify who "shall" perform this duty if the Clerk does not:

> In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. § 2a(b).

This Court has held the interpretation of a statute must begin with the statute's language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. United States v. Turkette, 452 U.S. 576, 580 (1981). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979).

The plain language of 2 U.S.C. §§ 2a and 2b indicate that the Clerk must issue Certificates in accordance with the President's Statement and has no authority to revoke or modify an issued Certificate. The legislative history of the statute, as

discussed below, confirms that the Clerk cannot, without explicit statutory authority, revoke or modify the Certificate.

Each state is entitled to the number of seats shown in the President's Statement and indicated in its respective Certificate until the taking effect of a subsequent reapportionment. 2 U.S.C. §§ 2a and 2b. To interpret the statutes to allow the Certificate to be changed would render this entitlement language meaningless. It is in the nature of a vested right, upon which the states are entitled to rely in redrawing their Congressional districts. It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985). In construing a statute, a court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

The vesting of each state's entitlement probably occurs at the time the President's Statement is filed with the Congress; surely it vests when the Certificate is actually issued and received.

Thus, pursuant to 2 U.S.C. §§ 2a and 2b, once the President and Clerk acted, Washington was entitled to nine congressional seats until the next census and apportionment (in the year 2000). At the very least, this entitlement should not be upset pending a definitive ruling of this Court on the merits. The Clerk has no authority to revoke or modify a Certificate after it has been issued, or to issue any Certificate varying from the Statement of

the President. The Clerk may not be ordered to perform an act he has no authority to perform.

C. Legislative History Confirms That the Certificates of Entitlement are Irrevocable (Absent Congressional Action)

The legislative history of 2 U.S.C. §§ 2a and 2b confirms that Washington's entitlement is irrevocable, short of explicit direction by an act of Congress. There is only one historical instance in which a state was denied a seat to which it was entitled according to a Certificate. An explicit act of Congress was required to take away the seat.

In 1941, Congress debated amendments to 2 U.S.C. § 2. As required by the statute, as then written, the President had reported the 1940 census results to the Congress in the first week of 1941. At that time, the statute provided that the method of apportionment used in the previous census should continue to apply unless Congress ordered otherwise within sixty days.

The Senate did not act within sixty days. 87 Cong. Rec. 8053 (1941) (Statement of Senator Vandenberg). In commenting on the effect if Congress did not specifically order a change, Senator Vandenberg stated:

> When the Senate did not act within 60 days, the statute made reapportionment by so-called major fractions final and conclusive and binding upon all concerned. The case was closed; the incident was finished; and the Clerk of the House so notified the States.

Id.

To change that situation, it was recognized that a specific act was required. Such a retroactive change was bitterly

opposed. The debate confirmed the general proposition of our argument here: unless Congress specifically acts, the Certificates are final.

Despite this debate concerning the equities (87 Cong. Rec. 8078-83 (1941)), Congress voted to make the change in method retroactive and require new Certificates to be issued. Section 2b of the Act of November 15, 1941 provided as follows:

> (b) If before the enactment of this Act a certificate has been sent to the executive of any State under the provisions of such section 22, as in force before the enactment of this Act, the Clerk of the House of Representatives shall, within fifteen calendar days after the date of enactment of this Act, send a new certificate to such executive stating the number of Representatives to which State is entitled under this section.
>
> Approved November 15, 1941.

Pub. L. No. 87-291, 55 Stat. 761, 762 (1941) (originally codified as 2 U.S.C. § 2b).

The Clerk was to send a new Certificate of Entitlement if such a Certificate had been sent prior to November 15, 1941 (as they had). Thus, the new determinations were made, and the new Certificates issued (changing only Michigan and Arkansas).

This is the one occasion Congress was confronted with valid Certificates that it wished to change.

Congress' action in 1941, and the legislative history surrounding it, confirms that a Certificate of Entitlement cannot be revoked or modified by the Clerk unless and until Congress

enacts legislation to that effect. A court may not order the Clerk to perform beyond his statutory authority.[12]

D. **There Should Be Finality in Congressional Apportionment**

There should be finality in congressional apportionment because it would be harmful and disruptive to permit endless changes to political authority. Both federal and state courts recognize that there should be finality in political processes, especially procedures relating to elections. Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986), cert. denied, 480 U.S. 911 (1987) ("The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies").

Apportionment of congressional seats relates directly to elections, since legislative districts are drawn based on the number of seats awarded to each state. Washington, like many other states, has already expended considerable effort redistricting. To take a seat from Washington now would be disruptive, requiring redistricting efforts to start again, and undermining public confidence in our political process. By the time such efforts could begin, the census figures would have to be updated or would be more out of date than is inevitable under

[12] The statutory source of the district court's jurisdiction to order Congress--or the President--to take the actions directed is not clear. It is unlikely Congress waived its legislative immunity from suit in the jurisdictional statute relied on below. 28 U.S.C. § 1331.

the present process. In the interest of preserving the integrity and finality of the apportionment process, the Clerk should not now be ordered to revoke or modify Washington's Certificate at this late date. These public consequences must surely be considered. By themselves, they justify a stay of the district court's order. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

II. THE DECISION OF WHOM TO INCLUDE IN THE CENSUS IS ENTRUSTED BY CONGRESS TO COMMERCE; THE LOWER COURT'S INTERFERENCE REQUIRES STAY

A. The Secretary of Commerce Acted Within and In Accordance with Congress' delegation to Him of Census Authority

Congress vested broad discretion in the Secretary of Commerce as to the conduct of the census. 13 U.S.C. § 141. The Secretary acted within this discretion in deciding to include overseas federal employees, the count for apportionment purposes (a decision a predecessor had also made in 1970--with less accurate data to work from).

The court's conclusion in overturning the Secretary's decision and denying representation to those serving their country not only contradicts representational theory of a democratic society,[13] but the expressed intent of Congress as

[13] As a witness noted before a congressional committee considering the voting rights of overseas citizens:

> Our military community is subject to Federal and State taxes and, due to the nature of their profession, most have to leave their families, homes, and communities for extended

(Footnote continues on next page)

well. Congress has specifically provided for protection of the voting rights of overseas citizens, including overseas federal employees. 42 U.S.C. §§ 1973ff et seq. In so legislating, Congress has adopted a procedure similar to that followed by the Census Bureau in counting these same persons. The Census Bureau did not act arbitrarily in allowing voters to be counted and represented for apportionment purposes on a similar basis.

1. **The Workings of the Uniformed and Overseas Citizens Absentee Voting Act**

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (Voting Act). 42 U.S.C. § 1973ff et seq. The Voting Act provides a procedure for overseas citizens, including both military and civilian, to vote in federal

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(Footnote continued from previous page)
periods of time. However, absence from their State or community does not mean that they are not concerned about the policy decisions their elected representatives are making, or how their tax dollars are being spent.

Uniformed and Overseas Citizens Absentee Voting: Hearings on HR 4393 Before the Subcomm. on Elections of the Committee on House Administration, U.S. House of Representatives, 99th Cong., 2d Sess. 39 (1986) (testimony of C.R. Jackson, vice president for government affairs of the Non Commissioned Officer's Association of the United States of America).

As Representative Roberts noted, there has existed, "a very serious problem . . . overseas among the military and Federal civil service . . . of feeling disenfranchised, of being second class citizens, not having access to the system in which they really want to participate." Id. at 68. Massachusetts argues that despite Congressional action on voting, their votes should be emasculated by perpetuating that second class status when it comes to representation in Congress.

elections. It calls for absentee voting by postcard, with the normal state registration requirements waived. 42 U.S.C. § 1973ff.[14]

Congress has specified a procedure for determining in what state the citizen may vote which bears a striking similarity to that used by Census in determining where to count the citizen for apportionment purposes. This Congressional stamp of approval on a similar system supports the conclusion that the Secretary of Commerce acted reasonably in conducting the census.

In which state a voter is counted is determined by reference to the term "overseas voter", defined in 42 U.S.C. § 1973ff-6(5).

The definition of "absent uniformed services voter" specifically includes the requirement that the voter "is absent from the place of residence where the member is otherwise qualified to vote." 42 U.S.C. § 1973ff-6(1). The absent uniformed services voter therefore votes in the place where he or she would otherwise be qualified to vote,[15] while any other overseas voter votes in the state in which they were last domiciled.

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[14] Congress has reported that as of 1986, over six million voters took part in the predecessor to this program. H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2012.

[15] This Court has determined that military personnel have a right to establish residency on a military installation, and to register and vote in local, state, and national elections. Evans v. Cornman, 398 U.S. 419, 26 L. Ed. 2d 370, 90 S. Ct. 1752 (1970).

2. The Census Bureau Used an Appropriate Similar Method for Allocating Overseas Citizens to the States

The underlying general principle in locating individuals for census purposes is "usual place of residence." The task facing the Census Bureau in allocating overseas citizens to the various states is how to best implement that concept from the available data. The Census Bureau determined that the most accurate method was to start with data showing "home of record." The meaning of the term "home of record" is vital to determining the propriety of the Bureau's actions. The decision of the court below is based upon a misunderstanding of the term. The district court believed that the "home of record" data was subject to inaccuracy because the home of record could be a location chosen simply for tax reasons. Slip op. at 81. This is simply untrue. Home of record is not used by the Defense Department for the designation of the state to which an employee pays taxes, "legal residence" is used for taxes. See Joint Federal Travel Regulation, ch. 56, app. H, definition of "Home of Record", and Department of Defense Military Pay and Allowances Manual, § 70105, defining "legal residence," which is to be used for tax purposes.

The Census Bureau reviewed various alternatives and considered their relative merits as criteria for determining the state to which an individual should be apportioned. The thoroughly reasonable conclusion drawn was that home of record, the last permanent residence before entering the military, is the best approximation of usual place of residence. Home of record

data are intended to reflect the self-identification of the individual at the last point in time at which his/her residence is a matter of choice.

Not only is the concept of self-identification basic to the census as a whole, but resembles the determination of Congress (and the states) with regard to voting. Under the Voting Act, the overseas citizen is allowed to vote in the state in which he or she would otherwise be qualified. 42 U.S.C. § 1973ff-6. This too reflects the volitional acts of the voter.

Among the purposes of Congress in enacting the Voting Act was the policy that "U.S. citizens overseas may continue to vote for Federal office even if they have no current address in the United States." H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2010-11. The lack of a current address in the United States therefore did not trouble Congress in the context of allowing overseas citizens to vote in the fifty states. In fact, Congress expressly found that such voters should be allowed to vote. Id. The court below, however, found it "arbitrary and capricious" to afford citizens the same rights when it came to determining their representation in Congress.

Clearly, the Census Bureau considered similar factors to those considered by Congress. The home of record statistics used by the Census Bureau reflect the citizen's state of residence prior to his location being determined by order of the Executive (Commander-in-Chief). For voting purposes, similarly, Congress

chose to enable voters overseas to vote in the last state in which they had voluntarily chosen to become qualified.

Given this similarity of policy choices, it is difficult to discern anything arbitrary or capricious about the actions of the Census Bureau. It has been previously noted that Congress' record expressions of opinion on the "overseas count" and "home of record" issues were in favor of both (e.g. H.R. 4903, passed House June 26, 1990).

III. THE DISTRICT COURT'S ORDER DENYING CONGRESSIONAL REPRESENTATION TO PERSONS SERVING THE UNITED STATES (TEMPORARILY) OVERSEAS VIOLATES THOSE CITIZENS CONSTITUTIONAL RIGHTS AND SHOULD BE STAYED

The census procedures required by the court below would require Congress, acting through the Census Bureau, to violate constitutional rights of U.S. citizens under the equal protection component of the Fifth Amendment. Massachusetts asserts that the Census Bureau should treat residents of the United States working abroad on one day, April 1, 1990, differently than those located within the United States, for purposes of determining congressional representation, i.e., provide such citizens no representation. This conclusion is based on the belief that there is no reasonably accurate method for connecting persons temporarily overseas to their state. However, it has already been shown that a reasonable method exists for determining the state of overseas military and federal employees and their dependents. (Infra, pp. 22-23) Any census procedure that excludes persons who can be enumerated discriminates on its face

because those excluded are thus denied representation in the House of Representatives, as provided by article I, section 2 of the Constitution.

The equal protection component of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. See Bolling v. Sharpe, 347 U.S. 497 (1954). Census procedures are implemented by the Census Bureau under the authority delegated it by Congress, which the court below conceded has plenary power over census procedures. Massachusetts v. Mosbacher, slip opinion at 78, citing U.S. Const. art. I, § 2, cl. 3.

The Fifth Amendment's equal protection guarantees therefore apply to discriminatory census procedures. Analysis of equal protection under the Fifth Amendment is the same as under the Fourteenth Amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

The language of article 1, section 2, clause 3 strongly indicates that disfranchisement from representation may not be accomplished short of constitutional amendment. Women, children, prisoners, and even aliens have always been counted for purposes of apportionment, even while not entitled to vote. See Note, Constitutional Issues of the Federal Census, 94 Harv. L.R. 841, 847-8, (1981). The original language of article I, section 2 excluded from representation "Indians not taxed" and, by implication, two-fifths of all persons who were slaves. Since adoption of the Fourteenth Amendment following the Civil War, only "Indians not taxed" have been excluded. All other persons

are counted and allocated to the states for apportionment purposes. To treat those overseas on one day differently, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, and on each individual's right to fair representation in Congress. It is a particularly egregious violation where the overseas status, and duration, is ordered by the United States (the President, as Commander-in-Chief).

A. **Standard of Scrutiny.**

State apportionment statutes that dilute the effectiveness of some citizens' votes have been held subject to strict scrutiny under an equal protection analysis. Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Reynolds v. Sims, 377 U.S. 533, 561 (1964). No less rigid standard applies here. Fair representation is guaranteed to the states and their citizens by the Constitution; thus any infringement on that representation must withstand strict scrutiny. See Buckley, 424 U.S. at 94.

Such infringement is constitutional only if it is necessary to promote a compelling governmental interest. Kramer, 395 U.S. 627 (1969). While there may be no viable method for finding, counting and allocating to the states all United States citizens traveling abroad on census day, those who are in the military or employees of the federal government, as well as their dependents,

can be counted adequately.[16] Those who can be counted, must be counted.

Massachusetts bears the burden of showing that the practice of not counting federal and military employees and their dependents is necessary to achieve a compelling governmental interest. Under equal protection analysis, once a fundamental interest is identified and heightened scrutiny is determined to apply, the burden shifts to the government to show that the compelling interest test is met. See Kramer, 395 U.S. at 628; Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666-68 (1966). The burden here should fall on the proponent of the discriminatory classification, which in this case is the state of Massachusetts.

Moreover, the individuals deprived of representation under Massachusetts' scheme have a right to full representation in Congress through their home states. "'[T]he uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it.'" Carrington v. Rash, 380 U.S. 89, 97 (1965) (quoting Governor Arnall's message to the Georgia General Assembly, January 3, 1944). The same may be said of those serving their government as civilians and of dependents.

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[16] The data relied upon in 1990 is not arbitrary and capricious, nor inherently unreliable as noted above. Infra, pp. 22-23.

B. **History is No Barrier.**

Historical practices are no barrier to requiring full compliance with equal protection guarantees. The Supreme Court has never been persuaded to deny equal protection for reasons "based on exigencies of history or convenience." New York City Board of Estimate v. Morris, 489 U.S. 688, 703 n.10 (1989); Reynolds, 377 U.S., 579-80. Furthermore, enumeration methodologies have so far improved in the last decade as to obviate any argument that the practice is historically unsound. The Census Bureau is readily capable of allocating overseas federal and military personnel and dependents to the states for apportionment purposes. Both article I, section 2 and the Fifth Amendment's equal protection guarantees require no less.

IV. THE ACTION SHOULD HAVE BEEN DISMISSED BECAUSE WASHINGTON IS AN INDISPENSABLE PARTY

The court should have held that Washington (or other affected states) was indispensable, could not be joined, and dismissed plaintiffs' complaint (Fed. R. Civ. P. 19).

Two separate inquiries should have been conducted. First, are there parties who should be joined, either because their own interests or the interests of the parties might be harmed by their absence? Such parties, referred to as "necessary parties," must be joined if feasible. Fed. R. Civ. P. 19(a).

Second, if a party determined to be necessary under Rule 19(a) cannot be joined, should the action in "equity and good conscience" be dismissed? If the court determines that the

action should be dismissed the absent party is labelled "indispensable." Fed. R. Civ. P. 19(b); Eldredge v. Carpenters 46, 662 F.2d 534, 537 (9th Cir. 1981), cert. denied, 487 U.S. 1210 (1988). The inquiry is a practical one and fact specific. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968).

Washington was a necessary party under Rule 19(a)(2) because Washington claims an interest in its congressional seat, and the disposition of this action in Massachusetts' favor may impair or impede Washington's ability to protect its seat. The failure to join Washington also runs a risk of "leav[ing] . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations. . . ." Martin v. Wilks, 490 U.S. 754 (1989).[17]

Conflicting claims by beneficiaries to a common trust--House membership in this case--present a textbook example of a situation where one party may be severely prejudiced by a decision in the party's absence. See 3A Moore's Federal Practice, para. 19.08 at 19-165 (1984) ("Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally

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[17] Washington has pending litigation to enjoin the Clerk from changing its certificate. Montana already has an inconsistent order.

indispensable.") (quoted in Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986)).

In Carey v. Klutznick, 653 F.2d 732 (2nd Cir. 1981), cert. denied sub nom., Carey v. Baldrige, 455 U.S. 999 (1982), the court considered whether other states must be joined in a census case in which New York sought adjustment of population figures.

> "House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. . . . The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible."

Carey, 653 F.2d at 737.

Only if an adequate remedy can be awarded without the absent party, the suit may go forward. Idaho ex rel. Evans, 444 U.S. 380 (1980). Although the United States was held not indispensible in that case (as Washington argued), if either defendant state had been absent the case would have been dismissed for failure to join an indispensable party.

No shaping of relief or remedy is possible to lessen prejudice because the relief Massachusetts seeks is all or nothing--an award of an additional congressional seat, which must necessarily be taken from Washington or another state.[18]

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[18] The Court could presumably order expansion of the House. This would raise further separation of powers and jurisdictional problems which however seem not to trouble the lower court.

Since Washington was an indispensable party to this litigation and not joined, the court below should have dismissed the claims.

CONCLUSION

The injury caused by the orders below to Washington and its citizens and the detrimental impact on the public interest are substantial.

As argued above in the Brief and Jurisdictional Statement of the United States defendants, it is unlikely the decision will be upheld. Accordingly, a stay of the decision and orders pending appeal should be ordered.

Dated this 17th day of March, 1992.

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